IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1236
No. 77-1269

GENERAL ATOMIC COMPANY,

Petitioner,

against

EDWIN L. FELTER, etc., *et al.*,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT INDIANA & MICHIGAN ELECTRIC COMPANY IN RESPONSE TO BRIEF OF GOVERNMENT OF CANADA AS AMICUS CURIAE

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Indiana & Michigan Electric Company ("I&M") submits this brief in response to the Brief of Government of Canada as Amicus Curiae, filed with the consent of all parties on April 17, 1978.

Argument

The brief submitted by the Amicus Curiae erroneously assumes that the trial court directed General Atomic Company ("GAC") to disregard the laws of Canada and imposed sanctions for refusal to do so, but this is a mistaken assumption. The actual facts are as follows:

1. No outstanding order requires production of documents which are in Canada. The trial court's order dated November 18, 1977, which GAC presented for extraordinary review by the New Mexico Supreme Court on January 5, and February 20, 1978, did not require GAC to "produce documents located in Canada" (A. Br. 1)[1]; therefore the state supreme court's refusal of review did not "continu[e] in effect" (*id.*) any such order. The November 18, 1977 order (Pet. 1236, 2a-5a), rather, required identification of documents in Canada. It was entered on a Rule 37 motion after GAC failed to comply with a previous order, dated October 11, 1977 (*id.* 28a-32a), which required GAC to produce documents in Canada "[i]nsofar as it is lawful so to do" and to make a "diligent and good faith effort" to secure a waiver of any legal obstacles to production (*id.* 32a, 33a). GAC did not seek review of the October 11 order in the state supreme court. GAC's noncompliance with the direction in the October 11 order to "take affirmative action and to exert all lawful effort reasonable and possible to bring about the production" of documents located in Canada (Pet. 1236, 31a; UNC Cert. Br. 13a) was one of the grounds for the Sanctions Order and Default Judgment entered by the trial court on March 2, 1978 (and amended since), but that order is not final and has not been reviewed by the state supreme court. In light of this sanctions order, both the October 11 and November 18, 1977 orders would appear to have become moot.

1. Citations to the Brief of the Amicus Curiae are in the form "A. Br.". Citations to the petitions for certiorari are in the form "Pet. 1236" and "Pet. 1269". Citations to the brief in opposition to certiorari of United Nuclear Corporation ("UNC") are in the form "UNC Cert. Br."

2. The trial court's sanctions order, which is not properly before this Court,[2] was not based upon GAC's "failure to produce" (A. Br. 2) documents in violation of Canadian law, nor upon "Canada's proper enforcement of its Information Regulations" (*id.* 11). Neither did the trial court use GAC's compliance with Canadian law "as the basis for its fact findings" (*id.*). Rather, it explicitly based the sanctions it imposed upon GAC's history of willful discovery misconduct, including withholding documents located in the United States and failing to answer interrogatories in good faith (see Recitals 1-24, UNC Cert. Br. 3a-11a).

3. The trial court did not question the authority of Canada to prohibit disclosure of documents lodged within its borders, did not weigh the interests protected by the Canadian regulations against those served by American laws, and did not attempt to compel GAC to choose between obedience to Canadian or American law. At the same time it rightly required GAC to demonstrate the scope of supposed Canadian-law restrictions preventing discovery, and its findings of bad faith may well have been buttressed by GAC's shortcomings in this regard.

4. GAC's conduct with respect to the Canadian documents which, *inter alia*, justified sanctions consisted of (a) GAC's refusal without excuse to identify the Canadian documents (Recitals 25-30, UNC Cert. Br. 11a-13a), (b) GAC's failure to seek in good faith the lawful release of the documents (Recitals 31-35, UNC Cert. Br. 13a-14a), and (c) the deliberate policy of Gulf Oil Corporation ("Gulf") of housing evidence of the uranium cartel in

2. The trial court's sanctions order was entered after the decisions of the New Mexico Supreme Court sought to be reviewed herein, involved far different issues of fact and law, and is not final. Moreover, no justification is advanced for review by common-law certiorari. See Brief of Respondent Indiana & Michigan Electric Company in Opposition, at 24-26.

Canada to prevent its disclosure (Recitals 36-40, UNC Cert. Br. 15a).

The trial court in no way penalized GAC for acts of Canadian officials, nor did it adjudicate the legality of such officials' conduct. It clearly made no "unwarranted determinations regarding Canadian government activity and decisions" (A. Br. 11), since it made no such determinations at all. It imposed Rule 37 sanctions upon a recalcitrant party which was a United States domiciliary and over which it had *in personam* jurisdiction.

The trial court's recitals of fact concerning GAC's misconduct with respect to Canadian discovery were well-founded:

A. As to GAC's refusal to identify documents: GAC did not establish that identification of the documents was forbidden by Canadian law. Ordinarily under Canadian law (as under the standard practice in the United States) a party withholding documents from discovery must identify the items.[3] GAC furnished only ambiguous letters by a Canadian official, apparently not a lawyer, stating that production and identification of documents are not allowed (Pet. 1236, 37a-38a),[4] but it is agreed that this official has

3. Canadian rules of practice require identification of documents withheld during discovery, Federal Court Rules, Canada Gazette Part II, vol. 105, No. 5, SOR/71-68, P.C. 1971-270, February 9, 1971, and the security regulations, which do not refer to such idenfication, may be assumed to have been drafted with awareness of such practice.

Such identification of withheld documents is conventional in United States courts. *See, e.g.*, In re *Westinghouse Electric Corporation Uranium Contracts Litigation*, 70 F.R.D. 47 (W.D. Pa. 1977); *Sperry Rand Corp.* v. *International Business Machines Corp.*, 45 F.R.D. 287 (D. Del. 1968).

4. Moreover, the Canadian official in the letter cited was referring to identification "in the manner described" in GAC's letter (Pet. 1236, 38a), in which letter GAC had sought leave to provide a "summary of contents" (*id.* 36a) of each document. The "identification" directed in the November 18, 1977 order expressly excluded such a summary of contents (*id.* 3a). Its impermissibility has not been demonstrated.

no authority to waive or construe the regulations (Pet. 1269, 48a), and the Canadian government has stated that

> "The interpretation of the Regulations, including a determination of their scope, is a matter for Canadian courts." Diplomatic Note 116, 3/15/78, at 3.

The contentions of some Canadian officials that mere identification is prohibited (*id.*) have not been confirmed by any court (Pet. 1269, at 46a). The Legal Adviser to the Department of Energy, Mines and Resources emphasized to GAC the need for a judicial ruling (*id.* 46a, 49a), but GAC, whose duty it was to make disclosure, never sought such a ruling, although it was urged to do so by I&M (I&M Memorandum, 12/21/77, at 4).[5]

B. As to GAC's efforts to produce documents: GAC merely sought by letter a ministerial waiver to permit it to produce documents or identify them by, *inter alia*, summarizing their contents (Pet. 1236, 34a-36a). Its request was turned down (*id.* 37a-38a), and the minister no longer has the power to waive (*id.* 41a). On such showing GAC refused to produce any documents that are in Canada or to provide any information known to GAC or Gulf employees in Canada. No reasonable reading of the regulations justifies such position. The regulations only cover documents concerning discussions in the 1972-75 period; the request for production and GAC's refusal were not so limited.

5. The suggestion (A. Br. 4 n.4) that letters rogatory should have been employed by other parties proposes a needless exercise in futility. It was GAC's duty to comply with the outstanding discovery requests; it was not the duty of UNC or I&M to pursue GAC's documents by alternative routes. This Court did not suggest in *Société Internationale* v. *Rogers*, 357 U.S. 197 (1958), that American litigants were required to seek assistance from foreign courts to secure evidence abroad. There was no need to do so there or in this case, because the party controlling the evidence was before the United States court.

Moreover, the Canadian government has told GAC's counsel that nondocumentary evidence, such as facts known to employees, may lawfully be disclosed (Pet. 1269, 47a). GAC has provided neither a decision of a Canadian court nor an opinion of a Canadian lawyer sustaining its extreme position, and the trial court correctly concluded that no diligent and good-faith effort to provide discovery had been made.

C. As to concealment of documents in Canada to prevent disclosure: At a hearing on November 14, 1977 GAC was confronted with deposition evidence that Gulf's employees, at the direction of antitrust counsel, kept uranium cartel evidence in Canada to prevent disclosure in American judicial proceedings. GAC never rebutted this evidence, its trial counsel apparently conceded the point (Trial Tr. 11/14/77, at 11-72 through 11-75), and Gulf's attorneys later confirmed the fact (Affidavit of Frank J. O'Hara, sworn to Feb. 7, 1978; Affidavit of Roger K. Allen, sworn to Feb. 7, 1978). Such uncontradicted evidence fully supported the finding that any present-day problems in producing documents were of Gulf's own making, quite inconsistent with any claim of good faith in discovery. The trial court found that "Gulf's action in regard to storing cartel documents in Canada amounts to deliberately courting or seeking legal impediments to the production of the records" (Recital 40, UNC Cert. Br. 15a). This Court has recognized that such misconduct has "a vital bearing on justification for" the most severe sanctions. *Société Internationale* v. *Rogers*, 357 U.S. 197, 208-09 (1958).

It is beyond dispute that an American court may require a party subject to its jurisdiction to make discovery from abroad; *Société, supra; United States* v. *First National City Bank*, 396 F.2d 897 (2 Cir. 1968). The trial court did not depart from the cases, cited by Amicus Curiae (A. Br. 7n.12, 8n.13), involving the propriety of sanctions when disclosure is prohibited by foreign law. In accord with those cases the trial court inquired only whether Canadian law created an actual "inability to comply", *Société, supra*, 357 U.S. at 212, with discovery demands. It may have had insufficient aid in this from GAC (Pet. 1236, 45a), but its sanctions expressly do *not* rest upon, nor do they discourage, GAC's compliance with Canadian law. The trial court specifically told GAC *not* to violate Canadian law (Pet. 1236, 31a-33a; 45a-46a). Thus, the case raises no issue of conflicting legal obligations.

Decisions concerning possible sanctions for failure to make discovery prohibited by foreign law are therefore not apposite, but we do not wish to acquiesce in an erroneous reading of such cases (A. Br. 9). It is not the rule that a court must vacate a discovery order in such a case. To the contrary, legal excuses for noncompliance should be heard when sanctions are considered. *Société, supra*, 357 U.S. at 204-06; *see also* In re *Westinghouse Electric Corporation Uranium Contracts Litigation*, 563 F.2d 992, 997 (10 Cir. 1977).[6] Thus, whether Canadian law bars any action

6. *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616, 620 (2 Cir. 1959), *cert. denied*, 361 U.S. 948 (1960), likewise holds that supposed foreign law barriers will not be explored on motion to vacate a subpoena but rather in proceedings to punish for contempt. *Federal Maritime Commission* v. *De Smedt*, 268 F. Supp. 972 (S.D.N.Y. 1967), was a decision on just such a contempt motion after the subpoenas had been sustained on appeal, 366 F.2d 464 (2 Cir.), *cert. denied*, 385 U.S. 974 (1966). In *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2 Cir. 1962), the challenged subpoena was left outstanding despite possible foreign-law obstacles. *Ings* v. *Ferguson*, 282 F.2d 149, 153 (2 Cir. 1960), seems at variance with later holdings, but states, in any event, that after clarification of Canadian law a subpoena may still be employed. Recent Second Circuit precedents adjudicate foreign-law issues in considering punishment for contempt—not on motion to quash—even where disclosure from a third party is sought. *United States* v. *First National City Bank*, 396 F.2d 897 (2 Cir. 1968). *Accord*, In re *Westinghouse Electric Corporation Uranium Contracts Litigation*, *supra*.

directed by the November 18, 1977 order is properly considered only on a review of the sanctions imposed upon GAC, and not on the examination which GAC seeks now of the order alone, especially since GAC has not challenged the trial court's findings of misconduct at this stage. Moreover, cases concerning the question whether a third-party witness may fairly or usefully be subjected to sanctions are also not pertinent (A. Br. 7-8), since a just result in the principal dispute often cannot be achieved by such sanctions. The issue here is different, *viz.*, which adversary party should suffer from nondisclosure of relevant evidence, when one party acted in bad faith. Nor is it the only purpose of a foreign-documents discovery order to "facilitate clarification of foreign law" (A. Br. 7n. 12), although that is one useful function. Here GAC sought no such clarification. It never even objected to discovery on Canadian-law grounds, and when its patent nondisclosure drew fire, GAC, in bad faith, merely advanced an exaggerated construction of Canadian law. Such conduct has correctly been made the subject of sanctions. *See United States* v. *First National City Bank*, 396 F.2d 897, 900n. 8, 905 (2 Cir. 1968).

Moreover, GAC's misconduct went well beyond its misbehavior under the purported shield of foreign law and encompassed repeated refusals to make discovery in good faith and without evasion. Given GAC's refusal to produce Canadian documents, the entire burden of discovery fell to interrogatories, and when good-faith answers were not forthcoming discovery was effectively aborted. The trial court concluded that a fair trial had been prevented by GAC and correctly held it in default. *See, e.g., National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976); *cf. Ohio* v. *Arthur Andersen & Co.* ____ F.2d ____, No. 77-1571 (10 Cir. Feb. 9, 1978).

There is no need to embark upon a theoretical discussion of the question (suggested by the Amicus, A. Br. 11) whether administration of justice in an American court should be ranked above or below Canada's interest in secrecy of uranium cartel evidence. This case involves no denigration of Canada's sovereignty. There has been no violation of Canadian law, the Canadian documents have not been produced, and no order currently requires their production. Both countries' interests are preserved, and Canada's concern over the sanctions order is misplaced.[7] GAC and Gulf have been held to be subject to Rule 37 sanctions, not for refusing to violate Canadian regulations, but for, *inter alia*, abusing the Canadian regulations in bad faith to shield a conspiracy to violate United States laws and to injure United States companies, and to mask their deliberate refusal to provide non-evasive, good-faith discovery.

The evidence of GAC's bad faith in discovery is essential to any review or discussion of the trial court's sanctions order. The absence of that evidence from the present record and GAC's present unwillingness to challenge here the trial court's recitals of fact underscore the inappropriateness of review at this stage.

CONCLUSION

Nothing in the decisions below warrants the concern of the Canadian government nor requires review by this Court. The actions of the trial court will be scrutinized in detail on the forthcoming appeals to the highest court of New Mexico. Thereafter, there will be ample opportunity

7. Notably, the Canadian government takes no position on the merits of GAC's broad claims that the trial court improperly interfered with foreign relations or offended the act of state doctrine (A. Br. 2n. 1).

to consider whether review in this Court is appropriate. None of the traditional grounds for review exists in this case, and the brief of the Amicus Curiae raises no issues worthy of examination at this time. The petitions should be denied.

Respectfully submitted,

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